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No. 83-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAMAR ALEXANDER, Governor of the
State of Tennesse, et al.,

Petitioners,

– against –

Hershel Choate substituted for
ROSIER JENNINGS, deceased, et al.,

Respondents.

BRIEF OF *AMICUS CURIAE* UNITED CEREBRAL PALSY OF NEW YORK CITY, INC.

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INTEREST OF AMICUS CURIAE

United Cerebral Palsy of New York City, Inc. ("UCP") files this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court, in support of plaintiffs below.[1] UCP is a not-for-profit corporation which provides direct educational, medical, vocational, recreational, transportation and other services to over 2,000 children and adults afflicted with Cerebral Palsy and related handicaps resident in the City of New York. In addition, the agency conducts public and professional education and advocacy programs to promote the interest of the cerebral palsied and other handicapped persons.

[1] Letters of consent to the filing of the brief have been lodged with the Clerk of the Court.

The issues concerning the application of a disparate impact standard to programs receiving federal financial assistance under § 504 of the Rehabilitation Act directly affect the funding and operation of virtually all of UCP's programs. UCP also believes that its unique experiences as being simultaneously both a provider and an advocate enable it to bring to the Court important perspectives on the manner in which a disparate impact standard may protect the rights of the handicapped with due recognition for reasonable cost constraints.

STATEMENT OF THE CASE

Reacting to fiscal cutbacks in its federally funded Medicaid program, the State of Tennessee's Medicaid administrators decided to reduce the number of inpatient hospital days provided to each eligible recipient from 20 to 14. Together with other program reductions, this change was scheduled to go into effect on August 15, 1980. Studies prepared by the Medicaid program and introduced into evidence below indicated that if put into effect for the prior year, this change would have detrimentally affected 27.4 % of all handicapped hospital users and only 7.8 % of the non-handicapped.

The Court of Appeals for the Sixth Circuit, reversing the District Court, held that those facts constituted a "disparate impact" on the handicapped under § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). The Court remanded the case for further proceedings to provide defendants an opportunity to meet their burden of showing that there was a "substantial justification" for this particular cost limitation policy, especially in light of plaintiffs' allegations that an alternate policy, based on limiting the number of days in each stay, would produce equivalent cost savings with substantially less impact on the handicapped.

The specific issues before this Court are whether a "disparate impact" standard is the appropriate test for determining violations of § 504, and, if so, whether such a test was properly applied by the Sixth Circuit to the facts of this case.

SUMMARY OF THE ARGUMENT

Petitioners have erroneously applied to the context of discrimination against the handicapped political theory constructs borrowed from the race discrimination context, such as "equality of opportunity" versus "equality of result." Similarly, the legal doctrine of "discriminatory intent" is difficult to apply in the handicapped context because it is almost impossible in a particular situation to differentiate invidious animus from benign sympathy and/or overapplication of policies applicable to one subcategory of the handicapped to another. It is no coincidence, therefore, that virtually every court which has considered the issue has applied a "disparate impact" or "substantial justification" standard, and no court has applied a discriminatory intent standard.

"Disparate impact" is a meaningful approach for analyzing allegations of discrimination against the handicapped. It is essentially a "process" standard which provides the flexibility necessary to clarify complex liability issues and to construct practical remedies appropriate to the broad diversity of handicapping conditions. It permits a decision maker to consider whether alleged aggrievements stem from unreasonable policies or from limitations inherent to the disabling condition. The financial, political and administrative costs of proposed alternatives can best be weighed through a disparate impact analysis. The disparate impact approach is also fully consistent with this Court's emphasis in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) upon careful balancing of relevant considerations to determine the extent to which "reasonable accommodations" should be undertaken to meet the needs of the handicapped.

Application of a disparate impact standard is consistent with the legislative history of § 504. Although § 504 was patterned generally after Title VI of the 1964 Civil Rights Act, which this Court ruled in *Guardians Association v. Civil Service Commission*, 103 S.Ct. 3221 (1983) must be read to incorporate a discriminatory intent standard, the distinctive history and context of the passage of § 504 preclude an assumption that Congress meant to apply an intent standard to the handicapped context, where it would have little operational significance. Moreover,

since at the time of the passage of § 504 (and continuing to date), the Court had not articulated a constitutional standard for assessing claims of discrimination against the handicapped, there is no basis for concluding that Congress meant to incorporate a constitutional standard into the statute, as it did with Title VI. Finally, consistent with the views of a majority of the members of this Court in *Guardians*, even assuming *arguendo*, an "intent" reading of the statute, the disparate impact standard in the applicable federal agency regulations was still properly upheld by the Court below.

The Sixth Circuit's specific application of a disparate impact standard to the facts of this case was proper and imposed a minimal burden on defendants. In fact, defendants' burden of proof here was substantially less than the burden imposed on defendants in analogous situations arising under Title VI or Title VII of the 1964 Civil Rights Act. Defendants were not required on remand to consider all possible alternatives or to consider any alternatives which would not produce equivalent cost savings; they were merely asked to provide a "substantial justification" for a policy found to have a disparate impact on the handicapped in light of plaintiffs' proferred alternative which allegedly would result in equivalent cost savings to the State.

POINT I

DISPARATE IMPACT IS THE APPROPRIATE APPROACH FOR DETERMINING A PRIMA FACIE VIOLATION OF § 504

The critical concern underlying the positions of the petitioners, the United States as *amicus curiae*, and the District Court below is that adoption of a disparate impact standard in cases involving the handicapped will establish a right to "equality of results" rather than "equality of opportunity." Such an approach allegedly would require the State "to achieve identical results" for handicapped and non-handicapped recipients," (Petitioners' Brief at 24; Brief of the United States as *amicus curiae* at 21, *Jennings v. Alexander*, 518 F.Supp. 877, 883 (N.D. Tenn. 1981)) and "combining an equality of result standard with

a disparate impact test means the plaintiff always wins," *Jennings v. Alexander*, 715 F.2d 1036, 1049 (6th Cir. 1983) (Merritt, J., dissenting); Petitioners' Brief at 25.

These concepts of "equality of opportunity" and "equality of result,' upon which petitioners rely, are political theory constructs emerging from, and relevant to, problems of discrimination against racial minorities. *See, e.g.*, J.R. Pole, *The Pursuit of Equality of American History*, 351, 358 (1978). Although notions of discrimination in the two contexts are, of course, not totally unrelated, "attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole..." *Garrity v. Gallen*, 522 F.Supp. 171, 206 (D.N.H. 1981).

The Court of Appeals for the Sixth Circuit recognized these distinctions and based its ruling on the statutory intent and applicable regulatory standards as they relate to the state's specific actions in this case and their impact on the handicapped. The Court eschewed "wooden notion[s] of access," 715 F.2d 1036, 1043 n. 8, and other egalitarian concepts which the District Court and the dissent had borrowed from the race discrimination context;[2] instead it applied a disparate impact standard that calls for a reasonable consideration of whether the needs of the handicapped Medicaid patients were fairly considered by the defendants when they adopted the 14-day limitation.

A. DISCRIMINATORY INTENT IS NOT A MEANINGFUL STANDARD IN REGARD TO THE HANDICAPPED

In *Washington v. Davis*, 426 U.S. 229 (1976), this Court held that state actions challenged as racially discriminatory under constitutional equal protection standards would invoke rigorous, strict scrutiny review only where a discriminatory impact on a minority

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[2] Justice Rehnquist's opinion for the majority, in *Board of Education v. Rowley*, 458 U.S. 176, 198 (1982), similarly rejected a wooden "equal opportunity" interpretation of the Education of the Handicapped Act which had been adopted by the lower courts in that case because " 'equal' educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons."

group was accompanied by a showing of an invidious discriminatory intent. Petitioners, in essence, ask this Court to extend the *Washington v. Davis* intent/impact distinction from the racial discrimination context to the handicapped discrimination context.

In pressing for this extension, petitioners do not discuss the special factors affecting discrimination against the handicapped, or the legislative history of § 504; nor have they cited any previous decisions of this Court, or indeed of any lower federal courts, that would require a showing of discriminatory intent in order to establish liability on behalf of a handicapped plaintiff. On the contrary, virtually every court which has articulated a standard for assessing claims of discrimination under § 504 has either explicitly delineated a disparate impact or "effects" standard, or has set forth a requirement for a showing of "substantial justification," a burden of proof requirement that is premised on an implied disparate impact finding. *See, e.g., Bentivegna v. United States Dep't. of Labor*, 694 F.2d 619 (9th Cir. 1982) (job qualifications that "adversely affect the handicapped" must be vigorously scrutinized); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979) (showing of "detrimental effects" on retarded children requires "substantial showing" of policy's justification); *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (Rehabilitation Act calls for application of an impact test); *Lynch v. Maher*, 507 F. Supp. 1268, 1279 (D.Conn. 1981) ("substantial justification" required to ban quadriplegic from home care program); *Larry P. v. Riles*, 495 F. Supp. 926, 966-973 (N.D.Cal. 1979), (application of "effects test" to educational testing).[3] All of these cases were decided after *Washington v. Davis* and none of them considered

[3] Indeed, even the District Court opinion in this case agreed that "a disparate impact test is the appropriate standard to apply in a § 504 case..." 518 F.Supp. at 885. Judge Morton denied relief to the plaintiffs because, in his view (despite the explicit concession on this issue by the defendants), a *prima facie* case of disparate impact against an appropriately defined group of the handicapped had not been established. *See also*, Brief of the United States as *amicus curiae* at 7-8.

the intent/impact distinction articulated there to be relevant in the handicapped context.

The reason why the courts have consistently applied a disparate impact standard to cases involving the rights of the handicapped is not difficult to fathom: the legal concept of "discriminatory intent," although sometimes difficult to establish in the context of racial discrimination, is virtually impossible to apply in the context of discrimination against the handicapped, as a group. Although the handicapped have, at times, been victims of invidious discrimination, *see, e.g.*, Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*, 38 Am. Scholar 412 (1969); United States Commission On Civil Rights: *Accommodating The Spectrum Of Individual Abilities*, Ch. 2 (1983), most of the discrimination faced by handicapped individuals stems from non-invidious stereotyping which assumes that characteristics generally attributable to people with a particular handicapping condition will apply to all individuals with the condition (*see, e.g., Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983) (assumption that problems of hearing impairment cannot be sufficiently corrected to meet safety standards for bus drivers); *Costner v. United States*, 555 F.Supp. 146 (E.D.Mo. 1982), *rev'd* 720 F.2d 539 (8th Cir. 1983) (assumption that all epileptics are not reasonably capable of driving trucks in interstate commerce); *Coleman v. Casey County Board of Education*, 510 F.Supp. 301 (W.D.Ky. 1980) (assumption that amputee with artificial leg could not drive a bus safely), or from a well-intentioned, though sometimes misplaced, concern that certain activities would be detrimental to the welfare of the handicapped person as well as to others. *See, e.g., Upshur v. Love*, 474 F. Supp. 332 (N.D.Cal. 1979) (consideration of problems which would be faced by a blind school administrator); *Pushkin v. Regents of the University of Colorado)*, 658 F.2d 1372, 1387-90 (10th Cir. 1981) (consideration of problems which would be faced by psychiatric resident with multiple sclerosis).

The United States Court of Appeals for the Tenth Circuit aptly summarized the irrelevance of the discriminatory intent standard to the handicapped in *Pushkin, supra*, 658 F.2d at 1385, as follows:

> Defendants are creating a straw man and thereafter destroying it. It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken restrictive belief as to the limitations of handicapped persons.

See also New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982).[4] In short, a discriminatory intent standard is virtually impossible to apply in the handicapped context because of the difficulty of differentiating invidious animus and benign sympathies, or over-application of stereotypical assumptions, in analyzing the motivation behind any particular decision.

B. DISPARATE IMPACT IS A MEANINGFUL STANDARD IN REGARD TO THE HANDICAPPED

While a discriminatory intent standard is not generally relevant to the handicapped, a disparate impact[5] standard is uniquely

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[4] After noting the total inapplicability of a discriminatory intent (or "disparate treatment") standard in *Pushkin*, and that claims under § 504 "would be analyzed more readily under a disparate impact" approach, the Tenth Circuit held that, in the context of an employment discrimination claim of an individual plaintiff, § 504 sets its own statutory criteria for scrutinizing such claims. Assuming *arguendo* the validity of the Tenth Circuits's approach in regard to individual employment discrimination claims, the specific statutory language does not precisely address the diverse, complex circumstances raised in pattern and practice employment discrimination suits or to other discrimination claims outside the employment context. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.14 (1973); *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252 n.5 (1981) (different burden of proof standards applied under Title VII to individual cases and pattern and practice cases). The brief *amicus curiae* of the Equal Employment Advisory Council overlooks these important distinctions.

[5] The terms "discriminatory impact" and "disparate impact" tend to be used interchangeably in the cases and commentaries, and similarly will be used (cont.)

responsive to the two major distinguishing characteristics of discrimination in this context. The first such characteristic is the difficulty of defining a coherent group of the handicapped. Unlike racial minorities (or victims of gender or age discrimination), the handicapped do not constitute an easily identifiable group sharing common physical, psychological, or cultural characteristics. Rather, the "handicapped" constitute a range of persons exhibiting such diverse disabilities such as blindness, cerebral palsy, and emotional disturbances. *See* J. tenBroek and F. Mattson, *The Disabled and the Law of Welfare*, 54 Cal. L. Rev. 809, 811 (1966); Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DePaul L. Rev. 953, 972 (1978).[6]

The concept of disparate impact is precisely tailored to deal with such definitional complexities. A focus on impact allows a decision maker to assess the extent to which the challenged action affects some or all of the subgroups that constitute the handicapped, and the seriousness of both the relative and the overall injury. Such an assessment can only be done in the grounded, factual context of an impact analysis.

(cont.)
interchangeably in this brief. The concept has been succinctly defined as follows:

"The disparate impact theory of discrimination provides that facially neutral practices which have an adverse impact on the opportunities of members of a protected class are illegal irrespective of any specific intent to create that impact, unless the practice is mandated by business necessity or has a manifest relationship to some legitimate interest of the defendant." Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a New Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1209, n.14 (1981).

[6] For these reasons, the difficulties in defining the applicable class of the "handicapped" discussed in the dissenting opinion below, 715 F.2d 1036, 1047-8, are not unique to this case, but apply generally to virtually any attempt to apply the general definition of the term "handicapped individual" as set forth in 29 U.S.C. § 706(7)(B); 34 C.F.R. § 104.3(j)(2) and 45 C.F.R. § 84.3(j)(2) to a specific factual context. However, the Court need not consider these specific definitional issues in this case since, as the Sixth Circuit found below, the extent of disparate impact involved here was sufficiently substantial to preclude the need for a fine-tuned definitional analysis and, in any event, the defendants had specifically conceded a disproportionate impact upon the "handicapped population of Medicaid recipients..." 715 F.2d at 1042, n.7.

The second major characteristic is that "handicapping conditions" are, to some extent, socially defined, rather than absolute criteria. Many disabilities exist, in whole or in part, only in relation to arbitrarily established physical barriers, sorting standards, or other societally imposed classifications or limitations. *See*,, F. Bowe, *Handicapping America: Barriers to Disabled People* (1978); J. Gliedman and W. Roth, *The Unexpected Minority: Handicapped Children in America* (1980); S. Sarason and J. Doris, *Educational Handicap, Public Policy and Social History* (1979); United States Commission On Civil Rights, *supra* at 5-10. On the other hand, it must also be noted that the very notion of "handicap" implies limitations which may, at times, justify decisions to exclude a disabled person from participation in certain programs or activities.

Thus, the need to weigh, in each particular factual context, the extent to which a particular aggrievement results from unreasonable social or physical restrictions, on the one hand, or from limitations inherent to the disabling condition that cannot reasonably be overcome, on the other, calls for the type of judicial scrutiny invoked upon a disparate impact analysis. Through such an analysis the decisionmaker can consider the financial, political and administrative costs of possible alternatives and decide whether a "reasonable accommodation" to the needs of the handicapped has been undertaken. Where warranted, a precise remedy, appropriate to the particular circumstances, can only be formulated through such a process. In short, prohibiting "discrimination" against the handicapped, in practice, often means ensuring that policies or practices which have a detrimental effect on the handicapped were not carelessly or callously imposed. An impact standard is the flexible, feasible approach for making such judgments.

The key provisions of § 504, in essence, provide analytic parameters that require government officials responsible for policies or practices which have a disparate impact on the handicapped to "substantially justify" their actions. Thus, the mandate that "no otherwise qualified handicapped person" shall be discriminated against "solely on the basis of his handicap" requires a court in practice to assess the impact of an exclusionary

practice on individuals or groups who claim to be handicapped and to determine whether any disparate impact which may exist may be justifiable. See Wegner, *The Anti-Discrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicaps Under Section 504 of the Rehabilitation Act of 1973*, 60 Cornell L.Rev. 403, 433-434 (1984).

As this Court's detailed analysis of the claims of the applicant to the nursing degree program in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) made clear, questions of qualification cannot be separated, in the context of the rights of the handicapped, from the issue of the extent to which a defendant has an obligation to provide modifications or "reasonable accommodations" to a federally funded program. While rejecting a reading of § 504 or the HEW regulations that would impose extensive affirmative action requirements fundamentally altering the program involved, or undue administrative burdens, the Court explicitly recognized in *Southeastern* that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." 422 U.S. at 412-413.

Southeastern makes clear, therefore, that as applied to the handicapped, the concept of discrimination is contextual. It requires a careful balancing of a) the qualifications and/or needs of the handicapped person or persons affected, b) the purposes of the program at issue, and c) the reasonableness of any attempts to accommodate the qualifications and needs of the handicapped in that context. *See Majors v. Housing Authority*, 652 F.2d 454 (5th Cir. 1981) (case removed for trial on key § 504 elements, despite agreed stipulation of fact on these issues). In the first instance, such contextual balancing is the responsibility of the relevant federal administrative agencies. *Southeastern* at 413. Where the agency has issued specific regulations that precisely govern the application of § 504 to the particular context, clearly the courts should defer to the expertise of the agency and apply its standards. *See, e.g., Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983) (Department of Transportation regulations calling for application of 3.5% of federal funds to

the needs of the handicapped held to satisfy "special efforts" requirements of Urban Mass Transit Act and program modification requirements of § 504). However, where, as here, the applicable federal regulations are not specific enough to resolve the particular factual issues, the requisite review of the "reasonable accommodation" of challenged state actions must be undertaken by the courts. *Shirey v. DeVine*, 670 F.2d 1188, 1198 (D.C. Cir. 1982).

In essence, then, in the § 504 context, a "disparate impact" standard can be viewed as a shorthand phrase to describe the appropriate steps that are required under *Southeastern*, in cases where there are no concrete administrative regulations covering the specific fact pattern involved. Invocation of the disparate impact standard provides a mechanism for courts to ensure that state officials have adequately considered the needs of the handicapped before taking actions which negatively affect them. Unlike an affirmative action requirement, disparate impact does not require a governmental agency to undo the affects of past discrimination;[7] it merely requires courts to inquire into the possible "thoughtlessness" of some official policies or practices. *Hobson v. Hanson*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

C. APPLICATION OF A DISPARATE IMPACT STANDARD IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF § 504

Petitioners argue in Point I of their brief that Congress intended only to prohibit intentional discrimination under § 504. This conclusion is not based on any substantive analysis of Congressional debates or Committee reports.[8] Rather it is built from

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[7] Where, however, Congress has specifically provided for affirmative action requirements, as in 29 U.S.C. §§ 791, 793, it has called for remedies which go beyond disparate impact/substantial justification requirements.

[8] "There is almost no substantive legislative history surrounding the development and enactment of § 504. There were, for example, no public hearings accompanying the original bills and there was almost no substantial floor (cont.)

inference based on this Court's treatment of the legislative intent behind the analogous provisions of Title VI of the 1964 Civil Rights Act in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Guardians Association v. Civil Service Commission*, 103 S.Ct. 3221 (1983).

Certainly, it cannot be denied that § 504 "was patterned after Title VI of the Civil Rights Act of 1964..." *Community Television v Godfried*, 103 S.Ct. 885, 892 (1983); *Consolidated Rail Corporation v. Darrone*, 104 S.Ct. 1248, 1255 (1984).[9] However, although Congress clearly intended to extend the anti-discrimination mandate of Title VI to cover this additional

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(cont.)
debate." Statement of Department of HEW, 41 Fed. Reg. 20296 (proposed May 17, 1976). *See, e.g.*, S.Rep.No. 318, 93d, Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076. Although the 1974 amendments expanded the definition of handicapped individuals applicable to § 504 (§ 111(a) of the Rehabilitation Act Amendments of 1974 (Pub. L. No. 93-516)) and 1978 amendments added § 505 to the Act specifying that the remedies, procedures and rights under Title VI should apply to cases brought under § 504 (Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120(a), 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794(a)(2)), there is litle explicit discussion of the meaning of the concept of discrimination available in the legislative debate or committee reports on the amendments. *See* S. Rep. No. 1297 (93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-6390. *See* generally, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 After* Southeastern, 80 Colum. L. Rev. 171, 172-176 (1980); Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 888-894 (1980).

[9] Section 504 had its origins in unsuccessful attempts by members of Congress to include the handicapped among those explicitly included in the protections of Title VI. S.3044, 92d, Cong., 2d Sess. 118 Cong. Rec. 525 (1972); H.R. 12154, 92d Cong., 1st. Sess. 117 Cong. Rec. 45, 945 (1971). The provisions of § 504 were originally introduced in their present form as part of the Rehabilitation Act of 1972. S.3987, 92d Cong., 2d Sess. 118 Cong. Rec. 30680 (1972). The Rehabilitation Act was a broad statute designed to enable handicapped persons to enhance their productive capability, foster self-sufficiency and independence, and integrate them into the work force by providing such services as rehabilitation counseling, physical and mental restoration services, (cont.)

group, it also was well aware of the distinctive characteristics of the handicapped.[10] Given the scantiness of the legislative history of § 504, the statute must be read in the context of its general "history and purposes," *Darrone*, *supra* at 1254, n.13, and this means that, as with the "primary objective" limitation involved in *Darrone*, Congress must be presumed to have had an intention to endorse the approach that makes most sense in the particular context in regard to the intent/impact distinction at the core of the present case. Congress cannot be presumed to have intended to adopt an "intent" standard that had little relevance to the actual problems it sought to correct.[11]

(cont.)
transportation and technological aids. *See* S.3987, 92d Cong. 2d Sess. 118 Cong. Rec. 30680 (1972) and S.7, 93d Cong., 1st Sess. 119 Cong. Rec. 156 (1973).

After its enactment by Congress, however, the 1972 Act was vetoed by President Nixon for the stated reason that this wide variety of new programs would be too costly. "Memorandum of Disapproval of Nine Bills," Pub. Papers: Richard M. Nixon, pp. 1042, 1045 (Oct. 27, 1972); "Veto of the Vocational Rehabilitation Bill," Pub. Papers: Richard M. Nixon, p. 223 (March 27, 1973). The Act was reintroduced the next year as the Rehabilitation Act of 1973 with § 504 again as one of its provisions. S.1875, 93d Cong., 1st Sess. 119 Cong. Rec. 16, 665 (1973); H.R. 8070, 93d Cong., 1st Sess. 119 Cong. Rec. 18116 (1973). The final version of the bill, which was adopted by Congress and signed into law in September 1973, was a compromise which reduced funding levels, gave equal (but not priority) service to the severely handicapped, and eliminated several proposed new programs. However, the civil rights provisions of § 504 remained untouched.

[10] *See, e.g.*, S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6389 (noting that the discrimination suffered by individuals simply by being classified or lableled, correctly or incorrectly, as handicapped "has no direct parallel in either race or sex discrimination."); 124 Cong. Rec. 30, 578 (1978) (statement of Sen. Cranston) (barriers facing handicapped individuals are both attitudinal and physical); 118 Cong. Rec. 525 (1972) (statement of Sen. Humphrey) (discussing explanations for exclusions of handicapped children from educational opportunities, including problems of transportation and architectural barriers.) *See also*, Statement of Dept. of HEW, 42 Fed. Reg. 22676 (1977) (the problem of ending discrimination on the basis of handicap is extremely complex "in part because of the 'diversity of types of handicap.' "

[11] The fact that "[a]t least 24 federal agencies have regulations which incorporate a 'disparate impact' test" (Brief of the United States as *amicus curiae*, p. 1, n.2) further exemplifies the inappropriateness of an intent standard in this context.

This Court held in interpreting analogous provisions of Title IX of the Education Amendments of 1972, "It is Congress' intention in 1972, not in 1964, that is of significance..." *North Haven Board of Education v. Bell*, 456 U.S. 512, 529 (1982). The fact that § 504 was adopted nine years after passage of Title VI, at a time when Congress was aware that Title VI was broadly being implemented by the federal administrative agencies through an impact standard (*see New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 649 n. 5 (2d Cir. 1979), means that the drafters of the Rehabilitation Act could have reasonably assumed that the broad anti-discrimination language they were borrowing from Title VI was relevent to this context and could be applied through a disparate impact standard that would assure protection for the handicapped.

The Court's interpretation of analogous provisions of Title VI in *Bakke*, *supra*, and *Guardians*, *supra*, does not require an inappropriate "intent" reading of § 504. In *Bakke*, a majority of this Court held that Congress in Title VI intended to incorporate the Constitutional anti-discrimination standard, and that "the meaning of the statute's prohibition [would] evolve with the interpretation of the commands of the Constitution." 438 U.S. at 340. (Opinion of Brennan, White, Marshall, and Blackmun, J.J.). In *Guardians*, seven members of the Court held that, following *Bakke*, the constitutional requirement for a showing of discriminatory intent articulated in *Washington v. Davis*, *supra*, must be deemed to be incorporated as the statutory intent of Title VI. (At the same time, however, a different majority held that regulations adopted by the administrative agencies enforcing Title VI, which incorporated a discriminatory impact standard should, nevertheless, be deemed valid and enforceable.)

Petitioners' assumption that the *Guardians* precedent compels an "intent" reading of § 504 overlooks both the separate historical context of the passage of § 504, discussed above, and the inapplicability of the Constitutional incorporation doctrine to § 504. In its consideration of the 1964 Civil Rights Act, Congress was keenly aware of the desegregation mandates of *Brown v. Board of Education*, 347 U.S. 483 (1954) and its progency;

in that context, the stated intent of Title VI was to aid in the enforcement of the Constitutional requirements. By way of contrast, at the time of the passage of the Rehabilitation Act in 1973, there was no history of problems of enforcement of Constitutional mandates in regard to the handicapped. On the contrary, there were, at that time, no clearly articulated constitutional standards for defining discrimination against handicapped persons.

Moreover, assuming *arguendo* that Congress meant to incorporate a constitutional standard into § 504, there is no basis for assuming that the appropriate constitutional equal protection standard would necessarily be the *Washington v. Davis* discriminatory intent standard applied by the Court in the race discrimination context. To date, this Court has specifically declined to rule on the issue of the appropriate constitutional standard to be applied to equal protection claims of the handicapped. *Schweiker v. Wilson*, 450 U.S. 221, 231 (1981).[12] Petitioners' approach, however, would require the Court to reach this constitutional issue, directly or by implication.

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[12] Most of the lower courts which have considered the matter have held that the constitutional standard in cases involving rights of the handicapped should be a "middle ground" equal protection test which would require a showing of a "substantial justification" for legislative enactments which had a detrimental effect on the handicapped. *See e.g., Cleburne Living Center v. City of Cleburne*,726 F. 2d 191 (5th Cir. 1984); *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983); *Sterling v. Harris*, 478 F.Supp. 1046 (N.D.Ill. 1979), *rev'd on other grounds sub nom. Schweiker v. Wilson, supra; Association for Retarded Citizens v. Olsen*, 561 F.Supp 473, 490 (D.N.D. 1982); *Frederick L. v. Thomas*, 408 F. Supp. 832, 836 (E.D.Pa. 1976); *Garrity v. Gallen, supra*, 522 F.Supp. at 236-237; *LORA v. Board of Education*, 456 F.Supp. 1211, 1275 (E.D.N.Y. 1978); *cf., e.g., Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71 (1st Cir. 1981); *Fialkowski v. Shapp*, 405 F. Supp. 946 (E.D.Pa. 1975) (cases discussing applicability of strict scrutiny standard to handicapped), and

Finally, assuming *arguendo* that petitioners' position concerning the dispositive applicability of *Guardians* is correct, the Sixth Circuit's decision in this case still should be affirmed on the basis of the distinction accepted by at least four members of this Court in *Guardians* that an impact standard may be upheld in order to enforce the applicable federal agency regulations rather than the statute itself. The regulations applicable to this situation clearly prescribe an "effects" test calling for a disparate impact standard.[13] Petitioners' argument that giving force to these regulations would not be "reasonably related to the purposes of the enabling legislation," *Guardians*, *supra*, 103

(cont.)
Burgdorf & Burgdorf, *The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 Santa Clara L. Rev. 855 (1975).

Such a "middle ground" constitutional standard is analogous to the "substantial justification" burden of proof requirement implicit in disparate impact analysis. Its wide acceptability by the lower courts as a constitiutional standard for discrimination against the handiapped, therefore, is a further indication of the appropriateness of a disparate impact standard in this context.

[13] 45 C.F.R. § 84.4(b)(4), applicable to state agencies receiving Medicaid funds, provides that:

"A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the *effect* of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the *purpose or effect* of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect ot handdicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state." (emphasis added) *See also* 45 C.F.R. § 84.52(a).

Petitioners, at page 13 of their brief, emphasize the "equality of opportunity/equality of result provisions of 45 C.F.R. § 84.4(b)(2), and imply that an impact standard is synonymous with the discredited "equality of result" approach. As argued above, however, there is no basis for making such an equation and the drafters of the regulation explicitly noted that use of the equality of opportunity/equality of result terminology in the handicapped context had different connotations than in the racial context. *See*, Statement of Department of HEW, 41 Fed. Reg. 20296 (1976) ("[H]andicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activitites, and identical treatment may, in fact, constitute discrimination.")

S.Ct. at 3254 (Stevens, J., dissenting) (citations omitted) is untenable. An "intent" reading of § 504, if not totally unwarranted, as argued elsewhere in this brief, is, at the least, no more inconsistent with application of "impact" regulations than was the decision to enforce the regulations in *Guardians* in the face of a specific "intent" reading of Title VI by seven members of the Court.[14] Moreover, given the complexities of determining and remedying discrimination in the handicapped context, the concrete experience of the administrative agencies and their specific regulations take on added significance.

POINT II

THE COURT BELOW CORRECTLY APPLIED THE DISPARATE IMPACT STANDARD TO THE FACTS OF THIS CASE

Petitioners claim that even if a disparate impact standard is appropriate for applying § 504, the Court of Appeals' decision here should be reversed because plaintiffs suffered no such impact. This argument is premised on an assumption that "equal access to 14 in-patient hospital days per year" is all that § 504 demands in the present circumstances" (Petitioners' Brief at 21) and that plaintiffs' position amounts to an unreasonable requirement that every governmental program "ensure equal efficiency." *Id.* at 24. The brief of the United States as *amicus curiae* analyzes in greater depth the inapplicability of the "equality of results" approach by which it characterizes the decision of the Court below. (Brief of the United States as *amicus curiae* at 21-22.)

The position of the petitioners and the Justice Department is fundamentally flawed, however, because it is based upon an artificial dichotomy between equality of access and equality of results which has no relevance to the handicapped context and does not provide a meaningful framework for considering the

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[14] Unlike the situation in *Southeastern Community College v. Davis*, *supra*, 442 U.S. at 411, the applicable regulations here are not being interpreted to impose a specific "affirmative action obligation on all recipients of federal funds," which might be deemed inconsistent with the statutory intent.

Court of Appeals' actual decision in this case.[18] Nowhere in the Court of Appeals' decision is there mention of plaintiffs' right to receive "equal results," "equal efficiency" or a full satisfaction of their health needs. Instead, the Court speaks of the need to give some reasonable consideration to alternative means that, it is claimed, could better meet the needs of the handicapped, without breaching the state's budget ceiling or unreasonably affecting other groups and individuals.

Specifically, the Sixth Circuit reversed and remanded the District Court's decision because "the plaintiffs proved a *prima facie* case of discrimination against the handicapped and purported

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[18] The difficulties of applying the equality of opportunity/equality of result dichotomy to the handicapped context are clearly reflected in the United States' *amicus curiae* brief. The argument there at first appears to adopt the simplistic position that the appropriate standard should be "equal shares" or "equal access," so that the mandate of § 504 would be met if the handicapped are given the same dollar value of services as the non-handicapped (Brief of the United States as *amicus curiae* at 13) or, applied to this case, an equal number of days in the hospital (*id.* at 17, 18). Later, however, the government admits by reference to examples such as the necessity for providing ramps to permit meaningful access to school or libraries that, at times, additional resources must be expended to render "access" or "opportunity" meaningful for the handicapped. (*id* at 27.)

The analysis concludes with a "fox and stork" example which purports to summarize the entire issue by stating that "if an equal amount of milk is offered in a container accessible to both, there is no discrimination under Section 504, even though the fox, in order to be healthy, needs more milk than the stork." (*Id.* at 28.) But this fable omits, in its simplicity, a number of key factors that a real world § 504 decisionmaker would need to know: What is the purpose behind the milk distribution program? Is the amount of milk being given to the stork grossly in excess of his reasonable needs? Is the additional amount required by the fox small or large? Does the additional increment constitute a life or death difference for the fox?

Reasonable application of § 504 clearly requires consideration of these questions in the particular factual setting; abstract access/result formulations cannot answer them. Under certain circumstances, handicapped plaintiffs might reasonably be entitled to a minimum level of benefits, even if their needs required greater *per capita* resource allocations. (*See, e.g., Board of Education v. Rowley, supra; Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983).) In other circumstances, such allocations might be held to be unreasonable. *See, e.g., American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

to present an alternative which has a less discriminatory impact and would meet the State's need to save money." 715 F.2d at 1044. The record further indicated that the plaintiffs' alternative which, purportedly, would fully provide the requisite cost savings to the State, but with lesser impact on the class of handicapped patients, had never even been considered as an option by the State officials. *Id.* at 1044-45.[16] The Court's specific remand directive was that:

> The State should be required to provide a substantial justification for its choice of a reduction in inpatient hospital days when equal savings could be achieved by limiting the number of admissions covered by Medicaid...The State could also meet its burden by proving that a limit on the number of admissions will not yield the same amount of cost savings achieved by the State's per day restriction. *Id.* at 1046 (citations omitted).[17]

Under the circumstances, the Court of Appeals' remand decision amounts, in essence, to a requirement that the state "explain its choice." *Id.* at 1044. Surely, given the State's responsibility under § 504 to insure that programs supported by federal funding permit reasonable participation by the handicapped, this is the minimal burden that reasonably could be imposed upon the defendants. Indeed, in light of the life-sustaining nature of the benefit at issue, the state's refusal to undertake

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[16] Plaintiffs' claim that their alternate approach would not require greater overall spending by the State for its Medicaid program distinguishes this case from *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979) and *Doe v. Devine*, 545 F.Supp. 576 (D.D.C. 1982), *aff'd on other grounds*, 703 F.2d 1319 (D.C. Cir. 1983). In both of these hospital cost cases, plaintiffs sought increased benefits for the mentally ill which would have substantially increased the defendants' overall costs; on the particular facts of those cases, the courts ruled that the cost containment measures were reasonable.

[17] Since plaintiffs had put forward an alternative cost saving measure based on a limit on the length of each hospital stay (Petitioner's Appendix A59-A61), it is not clear whether the Court of Appeals misconstrued plaintiffs' alternative or meant to put forward an additional alternative when it spoke of a "limit on the number of admissions."

such minimal consideration of known alternatives in use in other states (Pet. App. A158-A166) was astounding.

In formulating its remedial order, the Court below referred to two previous cases in which a disparate impact standard had been applied in the context of claims of racial discrimination under Title VI to medical cost cutback situations, *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) and *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981). In *Bryan*, the majority specifically considered, and rejected, the more demanding standard adopted by the courts in Title VII cases which would require an employer, upon a showing of a disparate impact, to establish compelling reasons of "business necessity" for rejecting an available alternative selection method with lesser disparate impact. *See, e.g., Blake v. City of Los Angeles*, 595 F.2d 1367, 1376 (9th Cir. 1979); *cert. denied*, 446 U.S. 928 (1980); *Robinson v. Lorilland Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).[18] Instead, the Court in *Bryan* held that in Title VI cases, it would call upon the government agency only to show that it had engaged in a reasonable policy making process which involved consideration of any clear alternatives which might have "obvious advantages"; the Court specifically eschewed a standard which would require a defendant to show that it had considered every possible alternative, since this would draw the courts into a "complex inquiry...[concerning] the wisdom of competing political and economic alternatives" 627 F.2d at 619.[19]

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[18] An even more stringent burden of showing "that no alternative course of action could be adopted" has been applied by courts in cases raising claims of housing discrimination under Title VIII of the 1968 Civil Rights Act. *See, e.g., Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978)).

[19] Judge Kearse's separate decision, concurring in part and dissenting in part, emphasized that in a Title VI context, the appropriate approach should be to first consider the rationality of the decision making process; and a "rational process must include consideration of appropriate alternatives in the light of a factual assessment of the effect of these alternatives." 627 F.2d at 623. She would hold in *Bryan* that the city had taken an unreasonably narrow view of the range of available alternatives and that the record showed a lack of sufficient information as to actual effects of the alternatives considered on the hospital patients involved. 627 F.2d at 624.

In *Medical Center*, the District Court had placed upon defendants a burden of showing that they had considered all possible less discriminatory alternatives and that no alternative with lesser disparate impact existed which would meet the defendants' legitimate aims. Sitting *en banc*, the Third Circuit agreed that defendants in the case at hand had met this heavy burden, but indicated that the District Court's approach was more stringent than Title VI required, since the plaintiffs should retain the burden of persuasion on the existence of feasible, less discriminatory, alternatives. 657 F.2d at 1336.[20]

The Sixth Circuit in the present case has fashioned a remedial approach for § 504 cases which is consistent with the moderate approach adopted by the majority opinions in *Bryan* and *Medical Center* in the Title VI context. Specifically the Court here:

a) Imposed an initial burden on plaintiffs to establish a *prima facie* case of discriminatory impact;

b) Then shifted the burden to defendants to show that the "decision making process was a rational one," 715 F.2d at 1044, "by coming forward with some substantial justification" for the plan it adopted. 715 F.2d at 1045.

c) To establish a substantial justification, defendants were not required to show that they had carefully considered all possible alternatives, or even all alternatives with "obvious advantages"; instead they were required to consider only plaintiffs' specific alternative plan which, it had been alleged, could accomplish the state's legitimate ends with lesser disparate impact at the same cost.

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[20] Justice Gibbons dissented on this point stating that:

"[S]ince in many cases the means of proof of justification will not be within the reach of the protected class and allocations of the burden of persuasion will be dispositive, the only allocation consistent with the Congressional intention to protect the disadvantaged class from actions showing discriminatory effects is to assign the burden of justifying the impact to the defendant who received federal funds." 657 F.2d at 1352. Justices Higgenbotham and Sloviter also endorsed the standard used by the District Court. 657 F.2d at 1337, n. 18.

d) In considering plaintiffs' alternative, the State would be required only to show either that (1) plaintiffs' plan is not a feasible, cost-saving alternative or (2) that the state's plan is superior for other reasons, despite its disparate effects. 715 F.2d at 1045.[21]

In essence, then, the court below merely imposed upon the state defendants a burden of providing a "substantial justification"[22] for its 14-day annual limit policy, in light of plaintiff's purported superior alternative plan. The manner in which the record developed in this case permitted the court here actually to impose a lesser burden than even the moderate approach of *Bryan* and *Medical Center*, since the present defendants have not been required to consider a range of alternatives; they merely are being asked to show that they have considered the possible advantages of the one specific alternative put forward by plaintiffs. This approach places a minimal burden on the state defendants to show that some reasonable consideration has been given to the needs of the handicapped population in a setting where cutbacks have had a severe disparate impact on their well-being.[23]

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[21] Presumably, if the state comes forward with evidence on either of these points, the plaintiffs will retain an ultimate burden of persuasion on the existence of a feasible, less discriminatory alternative. *See Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[22] The Sixth Circuit's "substantial justification" concept apparently was borrowed from the similar criterion utilized by this Court in cases applying the "middle ground" equal protection analysis. It therefore implies that state actions which have a disparate impact on the handicapped "must serve important governmental objectives and must be substantially related to achievement of those objectives. . ." *Craig v. Boren*, 429 U.S. 190, 197 (1976). A variety of factors enter into a substantial justification analysis, such as relative costs, efficacy, burdens on public services, and extent of plaintiffs' needs (*see, e.g., Plyler v. Doe*, 457 U.S. 202 (1982), and the precise weight to be given to each must necessarily depend on the specific circumstances. It is clear, however, that defendants' only seeming justifications for its refusal to even consider any alternative in this case, "administrative ease and convenience," standing alone, are not "sufficiently important objectives" to permit a disparate impact on a protected class. *Craig, supra* at 198.

[23] Following this Court's decision in *Southeastern Community College, supra*, a number of the lower federal courts have articulated a two-fold standard (cont.)

Given the modest nature of the remand order in this case, Judge Merritt's claim that under this approach, "plaintiff always wins" is clearly hyperbole. Plaintiffs will win in this case only if they establish on remand that their alternative approach is both feasible and cost-efficient.[24] Whether they will indeed meet that burden is yet to be seen. From *amicus'* point of view, the critical consideration is that the present defendants, as well as all other public officials, be made aware of their responsibility under § 504 reasonably to consider the impact of proposed policies and actions on the handicapped and to provide a substantial justification, in light of all the facts of the particular circumstances, for such actions.

(cont.)
for applying the reasonable accommodation requirements of § 504 to a variety of factual situations: 1) does the requested relief substantially interfere with existing program services; and 2) do such modifications place an undue financial and administrative burden on the defendant? *See, e.g., Turillo v. Tyson*, 535 F.Supp. 577 (D.R.I. 1982); *New Mexico Ass'n for Retarded Citizens*, 678 F.2d at 855; *Strathie v. Department of Transportation*, 716 F.2d 227, 231 (3d Cir. 1983); *see also* Note, *Accommodating the Handicapped: The Meaning of Discrimination Under § 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 900-902 (1980). *Cf.* Note, *Employment Discrimination Against the Handicapped and § 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 Harv. L. Rev. 997, 1012-1014 (1984). The Sixth Circuit's order in this case avoids the difficult cost balancing issues involved in these cases since the court here has indicated that only one alternative approach need be considered and that the precise level of cost savings sought by the State must be realized.

[24] Plaintiffs, in *Bryan* and *Medical Center*, in fact failed to meet the analogous "disparate impact" standards. The plaintiffs also were denied relief under the § 504 "substantial justification" standard applied by the Court to the hospital cost issues involved in *Bernard B. v. Blue Cross/Blue Shield*, 528 F.Supp. 125 (S.D.N.Y. 1981), *aff'd*, 679 F.2d 7 (2d Cir. 1982). *See also, Anderson v. Banks*, 520 F.Supp. 472, 511 (S.D.Ga. 1981).

CONCLUSION

For all the above reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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